UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD SAN FRANCISCO DIVISION OF JUDGES

COOLING FOR LESS, INC.

And Case 28–CA–105006

JOSEPH MILLER, an Individual

Daniel Rojas, Esq. and Paul Irving, Esq., for the General Counsel.

Jerald Finney, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Phoenix, Arizona, on December 10, 2013, upon the complaint, and notice of hearing, as amended (complaint), issued on August 30, 2013, by the Regional Director for Region 28.

The complaint alleges that Cooling For Less, Inc. (Respondent), violated Section 8(a)(1) of the Act by discharging employee Joseph Miller for engaging in concerted activity and for threatening employees with unspecified reprisals for engaging in protected-concerted activity.

Respondent filed a timely answer to the complaint stating it had committed no wrongdoing.

FINDINGS OF FACT

On the entire record, including the brief from counsel for the General Counsel, I make the following findings of fact.

¹ At the trial on December 10, 2013, counsel for the General Counsel moved to amend the complaint to allege additional violations, par. 4(b), alleging that Respondent violated Sec. 8(a)(1) of the Act by threatening its employees with unspecified reprisals because they engaged in concerted activities. The motion was granted. See GC Exh. 1(g).

I. Jurisdiction

Respondent admitted it is a corporation with an office and place of business located in Phoenix, Arizona, where it is engaged in the business of providing HVAC installation and repair services. Annually, Respondent in the course of its business operations purchased and received at its facility goods valued in excess of \$50,000 directly from points located outside the State of Arizona. Respondent admits in its answer and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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II. The Alleged Unfair Labor Practices

A. Facts

Respondent operates a heating and air conditioning business in Phoenix, Arizona. Gerald Finney (Finney) is Respondent's owner and Louis Wantroba (Wantroba) is Respondent's salesman and supervisor of its field employees. Respondent admitted and I find that both Finney and Wantroba are supervisors within the meaning of Section 2(11) of the Act. Respondent hired Joseph Miller (Miller) in March 2013 to install and repair heating and air conditioning systems.

From March to May 2013, Miller and his fellow employees spoke about not being paid enough. On April 26, 2013, Miller went to Respondent's office and spoke to Finney with fellow employee Casey Moore (Moore). Miller told Finney that he and Moore were not being paid as much as employees at other companies. Finney responded, "Then go there if you don't like it." Finney said he could do nothing about it.

Miller and other employees frequently had work delays due to Wantroba's inability to order the correct amount of supplies. For example, Wantroba's failure to order the correct amount of sheet metal delayed an installation by several hours. Wantroba also told Moore and Miller to violate air quality and safety regulations by ordering them to recover contaminated refrigerant from an old HVAC system and reuse it in a newer system.

On May 10, 2013, Miller was working on a job relocating a thermostat. When Miller was unable to get the thermostat to work, he called Wantroba and explained the problem. Wantroba told Miller to go to another job. As Miller was replacing panels on the air conditioning unit with his drill before he left the job, Wantroba appeared and said, "Why the fuck did I hear your drill? I have a service tech coming out here. Leave that panel off." Wantroba told Miller to get his ass to the other job. It was common for Wantroba to curse at employees on the job.

Miller left the first job and went to the residential job Wantroba had ordered him to.
Miller told Moore and fellow employee Frankie Crespo Jr. (Crespo) about Wantroba's telling him to get "his ass over [t]here pronto." Miller, Moore, and Crespo agreed that Wantroba was a jerk. After waiting for an hour, a crane arrived and Miller, Crespo, and Moore continued with the HVAC unit installation. After the system was installed, the employees tested the system.

Although the unit turned on, the employees noticed that the family room was receiving poor air flow. Miller discovered that the air vent was blocked by Styrofoam. Moore got a ladder so that they could remove the Styrofoam from all of the vents but the airflow was still poor. After the

Styrofoam was removed Wantroba arrived at the job. With Miller, Crespo and Moore present, Wantroba got on a ladder to inspect a vent and said, "This job is not done." While Wantroba was on the ladder, Crespo turned and walked away. Wantroba said to Crespo, "What the fuck is that look you gave Joey [Miller]? I saw that. I'm tired of your shit; you can just leave Junior." Miller replied, "Whoa, Louis, calm down. Junior didn't give you no look." Miller continued, "It's not our fault you don't know how to map stuff out." Wantroba came up to Miller, nose to nose, and said, "You better watch what you fucking say to me." Miller told Wantroba, "Louis, you don't know shit about installing air-conditioning." Wantroba said to Miller, "Get out of here, you're fired, you little punk." As he was walking away, Miller told Wantroba, "Go drink a 10 beer, dude, that's all you're good for." Wantroba repeated, "You'd better fucking watch what you say to me, you little punk." Miller replied, "I'll say whatever the fuck, I want." Miller then left the room. Miller denied saying he was going to kick Wantroba's ass. The customer at this residential job denied hearing any of this discourse and told Wantroba he did not hear the conversation between Wantroba and Miller.

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Wantroba denied that he ever used profanity with his employees but later admitted he probably swears at employees, then again denied any memory of swearing at employees. His testimony was contradicted by both Miller and Crespo. He also claimed that he fired Miller only for swearing and cussing in a customer's house. Later Wantroba revised his testimony and added that he also fired Miller for threatening him. Wantroba denied swearing at either Miller or Crespo at the residential job. Wantroba claims Miller called him and old drunk man and that he was going to kick his ass.

Frankie Crespo worked for Respondent as a heating and air conditioning installer for 25 5 years off and on and most recently from February to September 2013. Crespo corroborated Miller's testimony that he had complained to Respondent about his pay.

Crespo had a poor memory concerning the events at the residential job on May 10, 2013. He could not remember if Wantroba used profanity, exactly what was said or by whom, or who first raised their voice. Crespo claims both Miller and Wantroba were shouting and both said they would kick the other's ass. Crespo admitted, only after being shown his July 11, 2013 Board affidavit, that Wantroba told Miller, "if we weren't in the customer's house right now, he would beat the living shit out of him."

35 I found both Wantroba and Crespo to be unreliable witnesses. Wantroba repeatedly contradicted himself concerning the reasons for Miller's termination and his use of profanity. Wantroba was also contradicted about his use of profanity directed to employees by both Miller and Crespo. Crespo's memory of the events of May 10, 2013, was poor. He stated several times that his memory of the events was not good. On the other hand Miller's testimony had a 40 ring of truth to it and it was essentially internally consistent. Where there is a conflict between the testimony of Miller, Crespo, and Wantroba, I will credit Miller.

B. Analysis

1. Was Miller engaged in protected-concerted activity?

Section 7 of the Act provides that employees shall have the right to ". . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

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An analysis of whether an employee has engaged in protected, concerted activity involves both a determination of whether the activity was concerted and whether it was for the purpose of mutual aid. The Board, with approval of the Supreme Court has held that a finding that an employee's activity is "concerted" requires that activity be engaged with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985). The Board later added that concerted activity includes situations where individual employees seek to initiate or to induce or to prepare for group action. *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), enfd. sub nom. *Prill v. NLRB*, 834 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In this regard the Board has found that employees are engaged in concerted activity when a single employee protests other employees' terms and conditions of employment in the presence of his or her coworkers. *Chromalloy Gas Turbine Co.*, 331 NLRB 858, 863 (2000), enfd. 262 F.3d 184, 190 (2d Cir. 2001); *Whittaker Corp.*, 289 NLRB 933, 934 (1988).

In *Wyndham Resort Development Corp. dba*, 356 NLRB No. 104, slip op. at 2 (2011), the Board held in applying the principles of *Meyers*:

Applying those principles, the Board has consistently found activity concerted when, in front of their coworkers, single employees protest changes to employment terms common to all employees. The Board reasons that an employee who protests publicly in a group meeting is engaged in initiating group action. The concerted nature of an employee's protest may (but need not) be revealed by evidence that the employee used terms like "us" or "we" when voicing complaints, even when the employee had not solicited coworkers' views beforehand.

In *Wyndham* at slip op. 2, the Board found that an employee present at a group meeting of sales employees who questioned his supervisor if a dress code rule applied only to them was engaged in concerted activity. The Board reasoned,

[...] that an employee who protests publicly in a group meeting is engaged in initiating group action. The concerted nature of an employee's protest may (but need not) be revealed by evidence that the employee used terms like "us" or "we" when voicing complaints, even when the employee had not solicited coworkers' views beforehand.

Second, the employee's activity must be for the mutual aid or protection of his fellow employees. An activity is for "other mutual aid or protection" if it is designed to improve terms and conditions of employment or otherwise improve employees' lot as employees. *Eastex, Inc., v. NLRB,* 437 U.S. 556, 565 (1978).

Here, prior to Wantroba's arrival at the residential job on May 10, 2013, Miller complained to Crespo and Moore about his earlier treatment by Wantroba when Wantroba cursed at Miller. All agreed that Wantroba was a "jerk" i.e., his conduct was inappropriate. It appears that employees were adversely affected on the job because Wantroba often failed to order parts and supplies. Wantroba also ordered Miller and Moore to reuse refrigerant fluid in violation of code. Miller came to Crespo's aid and voiced the concern he and fellow employees had been talking about concerning Wantroba's abuse of employees by yelling and swearing and causing undue problems by failing to properly order parts and lay jobs out. It is significant that Miller defended both himself and fellow employees Crespo and Moore from Wantroba's accusation that they had not done the job by saying that "It's not our (emphasis added) fault you don't know how to map stuff out."

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I find that Miller was engaged in protected concerted activity when he told Wantroba that it was not the employees' fault because Wantroba did not know how to lay jobs out.

2. Did Miller lose the protection of the Act?

Respondent contends that it fired Miller for using profanity in a customer's house and for threatening Wantroba.

The exercise of protected activity by employees can lead to "animal exuberance" that requires the Board to determine if the activity is so egregious as to remove the employees from the protection of the Act. In deciding whether an employee has gone from protected to unprotected activity the Board looks to (1) the place of the discussion, (2) the subject matter, (3) the nature of the employee's outburst, and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. *Atlantic Steel*, 245 NLRB 814, 816 (1979).

As noted above, I have not credited either Wantroba or Crespo's testimony that Miller threatened to kick Wantroba's ass. Moreover, the credited testimony reflects that profanity was condoned and used regularly on jobsites by Wantroba. While Miller admits telling Wantroba he did not know shit about installing air conditioning, Miller's statement was an extension of his concerted activity in complaining in the presence of his fellow employees about Wantroba's poor supervision and its effect on the Respondent's employees. Further Wantroba was aware that the homeowner where the dispute took place did not hear the exchange between Wantroba and Miller. Miller's profane outburst was made only after Wantroba threatened him in violation of Section 8(a)(1) of the Act. It did not remove him from the protection of the Act. CKS Tool & Engineering, 332 NLRB 1578 (2000),

3. Did Respondent violate Section 8(a)(1) of the Act by terminating Miller?

To establish that an employer has terminated an employee in violation of the Act, the General Counsel must prove by a preponderance of the evidence that the employee's protected activities were a motivating factor in the employer's decision. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In meeting its burden, the General Counsel must establish that the discriminatee engaged in protected activity, that the employer had knowledge of this activity, and that the employer carried out the adverse employment action because of the protected activity.

Here, the General Counsel has established that Miller was engaged in protected, concerted activity at the time Wantroba fired him. Indeed, Wantroba warned Miller to watch what he was saying. When Miller continued to protest Wantroba's lack of supervisory skill, Wantroba fired him. Wantroba's explanation for firing Miller does not withstand scrutiny. I have found no probative evidence that Miller in any way threatened Wantroba. Indeed the opposite is the case as the much larger Wantroba said he would beat the shit out of Miller if they were not in the customer's house. It is apparent that Wantroba's claim that he fired Miller for using profanity is mere pretext in view of Wantroba's own liberal use of profanity on the job, and Wantroba's knowledge that the customer did not hear any of the exchange between him and Miller. I find that Respondent violated Section 8(a)(1) of the Act in terminating Miller because Miller was engaged in protected, concerted activity.

4. Did Respondent violate Section 8(a)(1) of the Act by threatening Miller with unspecified reprisals.

The General Counsel contends that Wantroba's repeated statement to Miller that "You better watch what you fucking say to me" is a threat of unspecified reprisal that that violates Section 8(a)(1) of the Act.

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In *Jordan Marsh Stores*, 317 NLRB 460, 462-463 (1995), the Board held that a supervisor's statement warning employees to "watch out" due to their union or concerted activities violated Section 8(a)(1) of the Act. See also *Gaetano & Associates*, 344 NLRB 531, 534 (2005); *St. Francis Medical Center*, 340 NLRB 1370, 1383–1384 (2003).

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Here, right after Miller engaged in protected, concerted activity by telling Wantroba that "it wasn't the employees fault you don't know how to map stuff out, Wantroba threatened Miller "that he better watch what you fucking say to me" This was clearly a threat that was designed to chill Miller's exercise of his Section 7 rights in protesting the employees' dissatisfaction with Wantroba's supervision of them. Wantroba's threat violated Section 8(a)(1) of the Act. *Jordan Marsh Stores*, supra.

CONCLUSIONS OF LAW

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- 1. Respondent Cooling For Less, Inc., is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. By threatening its employees with unspecified reprisals, Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act.

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3. By discharging its employee Joseph Miller, Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The evidence having established that the Respondent discharged its employee Joseph Miller, my recommended Order requires the Respondent to make him whole. My recommended Order also requires the Respondent to offer Joseph Miller immediate reinstatement to his former position, displacing if necessary any replacements, or if his position no longer exists, to a substantially equivalent position, without loss of seniority and other privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. My recommended order further requires that backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The recommended order also requires that the Respondent shall expunge from its files and records any and all references to the unlawful discharge of Joseph Miller, and to notify him in writing that this has been done and that the unlawful discrimination will not be used against him in any way. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Further, the Respondent must not make any reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the expunged material against him in any other way.

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The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act.

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 8 (2010).

The General Counsel also requests that discriminatees be reimbursed for any excess taxes owed as a result of a lump-sum backpay award and that Respondent be ordered to complete the appropriate paperwork as set forth in IRS Publication 975 to notify the Social Security Administration what periods to which the backpay should be allocated as requested in the remedy section of the complaint.

In *Latino Express, Inc.*, 359 NLRB No. 44 (2012, the Board ordered that retroactively it will routinely require the filing of a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters. The Board also held that it will routinely require respondents to compensate employees for the adverse tax consequences of receiving one or more lumpsum backpay awards covering periods longer than 1 year. The Board concluded that it is the General Counsel's burden to prove and quantify the extent of any adverse tax consequences resulting from the lump-sum backpay award and that such matters shall be resolved in compliance proceedings.

Pursuant to *Latino Express*, I will order that Respondent shall file a report with the Social Security Administration allocating any backpay awards to the appropriate calendar quarters.

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.²

ORDER

- 10 The Respondent, Cooling For Less, Inc., Phoenix, Arizona, its successors, and assigns, shall
 - 1. Cease and desist from

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- (a) Threatening its employees with unspecified reprisals because they engaged in protected-concerted activities.
 - (b) Discharging its employee Joseph Miller because he engaged in protected-concerted activities.
 - (c) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- 25 (a) Within 14 days of the Board's Order, offer Joseph Miller full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed.
- (b) Make Joseph Miller whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.
 - (c) Within 14 days of the Board's Order, remove from its files any reference to the unlawful discharge of Joseph Miller and inform him in writing that this has been done, and that the Respondent's unlawful discrimination against him will not be used against him as the basis of any future personnel actions, or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against him.
- (d) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in

² If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

Administrative Law Judge

electronic form, necessary to analyze the amount of backpay and other earrings and benefits due under the terms of this Order;

- (e) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by 5 the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as 10 by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall 15 duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July of 2013.
 - (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 26, 2014

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³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees and to abide by its terms.

Accordingly, we give our employees the following assurances:

WE WILL NOT threaten you with unspecified reprisals for engaging in protected, --concerted activity.

WE WILL NOT fire you in order to discourage your protected-concerted activities that are protected under Section 7 of the National Labor Relations Act or for giving testimony at an NLRB hearing.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by the National Labor Relations Act.

WE WILL reinstate Joseph Miller to his former position of employment.

WE WILL make Joseph Miller whole for any loss of earnings and benefits, including interest, he sustained as a result of our discharge.

WE WILL within 14 days from the date of the Board's Order, remove from our files any and all records of the discrimination against Joseph Miller and WE WILL within 3 days thereafter, notify him in writing that we have taken this action, and that the material removed will not be used as a basis for any future personnel action against him or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against him.

		COOLING FOR LESS, INC.		
		(Employer)		
Dated	Ву			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099

(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-105006 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.